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~~TOP SECRET// [REDACTED] //CEO~~

File: 2200-A-2023-05

INTELLIGENCE COMMISSIONER

DECISION AND REASONS

**IN THE MATTER OF A REQUEST BY THE
CANADIAN SECURITY INTELLIGENCE SERVICE
TO THE DIRECTOR OF THE CANADIAN SECURITY INTELLIGENCE
SERVICE FOR AN AUTHORIZATION TO RETAIN A FOREIGN DATASET
FOR THE [REDACTED]
PURSUANT TO SECTION 11.17 OF
THE *CANADIAN SECURITY INTELLIGENCE SERVICE ACT***

JUNE 21, 2023

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ANNEX A

I. OVERVIEW

1. This is a decision reviewing the reasonableness of the conclusions of the Director of the Canadian Security Intelligence Service (CSIS or Service) authorizing CSIS to retain the [REDACTED] (Foreign Dataset) pursuant to subsection 11.17(1) of the *Canadian Security Intelligence Service Act*, RSC 1985, c C-23 (*CSIS Act*).
2. The dataset regime set out in sections 11.01 to 11.25 of the *CSIS Act* provides CSIS with the ability to collect, retain and analyse personal information that is not directly and immediately related to activities that represent a threat to the security of Canada, but that is nevertheless relevant to the performance of its duties and functions.
3. CSIS may collect a foreign dataset if it is satisfied that the dataset is relevant to the performance of its duties and functions under sections 12 to 16, and reasonably believes that the information predominantly relates to non-Canadians who are outside Canada.
4. Following collection by CSIS, the Minister, or his designate, must authorize its retention which must subsequently be approved by the Intelligence Commissioner. The Director was designated by the Minister on September 11, 2019, to authorize the retention of foreign datasets.
5. The Foreign Dataset was obtained by CSIS prior to the establishment of the dataset regime, and was therefore deemed to have been collected upon the coming-into-force of section 96 of the *National Security Act, 2017*, namely July 13, 2019. On October 11, 2019, CSIS requested that the Director issue an authorization for its retention. On May 15, 2023, the Director issued the authorization (Authorization).
6. On May 16, 2023, the Office of the Intelligence Commissioner (ICO) received the Authorization for my review and approval under the *Intelligence Commissioner Act*, SC 2019, c 13, s 50 (*IC Act*).

7. Having completed my review, I am satisfied that the Director's conclusions relating to the retention of the Foreign Dataset are reasonable. Consequently, I approve the Authorization to retain the Foreign Dataset pursuant to paragraph 20(2)(a) of the *IC Act*.

II. CONTEXT

8. The Foreign Dataset contains [REDACTED] data records. A data record is a row of information, and for each row, there are a number of columns containing information. Information in some columns is assessed, [REDACTED]
[REDACTED] The Foreign Dataset is composed [REDACTED]
[REDACTED] The information originates from [REDACTED]
9. Additional information on the Foreign Dataset, including its origin, a description of its contents, and the steps taken during its evaluation, can be found in the classified annex to this decision (Annex A). I am including this information in a classified annex for two reasons. First, it will prevent the redaction of a significant portion of text of this decision thereby rendering its public version easier to read. Second, it will ensure that the nature of the facts that were before me, which otherwise would only be available in the record, is included in the decision.
10. This Authorization is one of three authorizations for the retention of foreign datasets received by the ICO on May 16, 2023. These are my first decisions as Intelligence Commissioner dealing with the retention of foreign datasets. For that reason, in the first decision rendered – File 2200-A-2023-04 [*IC Foreign Dataset Decision*] – I provide information on the legislative context of the dataset regime as well as additional analysis explaining the interpretation of the legal threshold to be applied to the retention of a foreign dataset. For ease of reading, this information is not included in the other two decisions.
11. Given the already existing number of files for review at the ICO, pursuant to paragraph 20(3)(b) of the *IC Act*, the Director proposed that rather than rendering my decision within

the normal 30-day period, an additional 30 days be provided to me to render my decision in this matter, which I accepted.

12. In accordance with section 23 of the *IC Act*, the Director confirmed in his cover letter that all materials that were before him to arrive at his Authorization have been provided to me. Thus, the record before me is composed of the following:

- a) The Director's Authorization;
- b) A draft of the Director's Authorization;
- c) Memorandum to the Director from CSIS, undated, requesting that the Director issue an Authorization to retain a Foreign Dataset, with Appendix A which includes details on the contents of the dataset, and Appendix B - Ministerial Direction on Intelligence Priorities (2019-2021);
- d) Briefing Note to the Director describing how CSIS manages and maintains datasets for backup and recovery purposes, dated [REDACTED];
- e) Designation of the Director by the Minister pursuant to section 11.16(1) of the *CSIS Act*, dated September 11, 2019;
- f) [REDACTED];
- g) [REDACTED];
- h) Presentation deck on ministerial authorization of foreign datasets;
- i) Briefing Note addressing how [REDACTED] information contained in the Foreign Dataset remains "likely to assist", dated November 10, 2022;
- j) Briefing Note concerning additional information regarding the removal of Canadian-related records from the Foreign Dataset, dated August 15, 2022;
- k) Briefing Note concerning the discovery of a copy of the Foreign Dataset, dated July 29, 2022;
- l) The Ministerial Directive to CSIS on the Government of Canada Intelligence Priorities (2021-2023), dated September 8, 2021;
- m) Summary of meeting with the Director, dated [REDACTED];

III. STANDARD OF REVIEW

13. The Intelligence Commissioner's jurisprudence establishes that the reasonableness standard, as applied to judicial reviews of administrative action, applies to my review.

14. The Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paragraph 99, succinctly describes what constitutes a reasonable decision:

A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision.

15. Relevant factual and legal constraints can include, for example, the governing statutory scheme, the impact of the decision and principles of statutory interpretation. Indeed, to understand what is reasonable, it is necessary to take into consideration the context in which the decision under review was made as well as the context in which it is being reviewed. It is therefore necessary to understand the role of the Intelligence Commissioner, which is an integral part of the statutory scheme set out in the *IC* and *CSIS Acts*.

16. A quasi-judicial review by the Intelligence Commissioner will be informed by the objectives of the statutory scheme as well as the roles of the Minister, or his designate, and the Intelligence Commissioner. I am to carefully consider and weigh the important privacy and other interests of Canadians and persons in Canada that may be reflected by the authorization under review – in this case, the authorization to retain a foreign dataset.

IV. ANALYSIS

17. Section 17 of the *IC Act* requires that I review the Director's conclusions made under subsection 11.17(1) of the *CSIS Act* and on the basis of which the Authorization was made to conclude whether they are reasonable. Subsection 11.17(1) sets out three mandatory criteria that the Director must be satisfied have been met:

- a) the dataset is a foreign dataset;

- b) the retention of the dataset is likely to assist the Service in the performance of its duties and functions under sections 12, 12.1, 15 and 16; and
- c) the Service has complied with its obligations under section 11.1 to exclude information relating to physical or mental health of an individual and Canadian-related information.

i) Are the Director's conclusions reasonable?

a) The dataset is a foreign dataset

18. Pursuant to section 11.01 and paragraph 11.07(1)(c) of the *CSIS Act*, a foreign dataset is defined as a dataset that predominantly relates to individuals who are not Canadians and who are outside Canada, or to corporations that were not incorporated or continued under the laws of Canada and who are outside Canada.

19. The Director relies on four facts to justify his conclusion that the dataset is a foreign dataset:

- i) the title and the description of the dataset indicate [REDACTED] the dataset originates; ii) the personal information [REDACTED] comes from a category of individuals centered outside Canada; iii) [REDACTED] [REDACTED] in a language other than French or English, and [REDACTED] [REDACTED] and iv) of the records that included [REDACTED] CSIS assessed that none were determined to be Canadian.

20. I am satisfied that the record justifies the Director's conclusion that the dataset predominantly relates to non-Canadians and persons outside Canada, and therefore find his conclusion reasonable.

b) The retention of the foreign dataset is likely to assist CSIS

21. Determining whether the retention of a dataset is likely to assist CSIS in the performance of its duties and functions requires a contextual analysis.

22. As part of the context, the Director describes how the activities of the foreign state where the Foreign Dataset originates constitute threats to the security of Canada. Relying on the request presented to him by CSIS, he provides examples and explains how the Foreign Dataset is likely to assist CSIS in the performance of its duties and functions in relation to the activities of that foreign state for each of the sections 12, 12.1, 15 and 16 of the *CSIS Act*.
23. More specifically, the Director describes that the usefulness of the Foreign Dataset rests principally with assisting CSIS in [REDACTED]
[REDACTED]
[REDACTED]
24. I note that the record describes that the majority of the information in the Foreign Dataset consists of [REDACTED]
[REDACTED] information pertinent to threat-related activities of the foreign state from which the information originates. I am of the view that this factor supports the Director's conclusion that the Foreign Dataset is likely to assist the Service.
25. The record clearly shows that the information contained in the Foreign Dataset is varied and includes information that would assist CSIS [REDACTED]
[REDACTED]
[REDACTED]
26. In his conclusions, the Director raises the fact that CSIS' request to retain the Foreign Dataset was submitted to him in October 2019 and references the Government of Canada Intelligence Priorities for 2019-2021 to support the rationale that the Foreign Dataset was likely to assist CSIS. The request highlighted that the Foreign Dataset was "relevant" to certain priorities. The Director notes that the Minister has since issued a new Ministerial Directive to CSIS on the Government of Canada Intelligence Priorities for 2021-2023.
27. In essence, the Ministerial Directive on Intelligence Priorities sets out the Government's intelligence priorities as adopted by Cabinet. The priorities are intended to guide intelligence

production efforts. The Ministerial Directive is issued pursuant to subsection 6(2) of the *CSIS Act* and directs CSIS to undertake its activities related to the priorities.

28. Although noting that the two versions of the Intelligence Priorities are structured differently, the Director makes reference to specific intelligence priorities in the 2019-2021 version which were used as part of the rationale to retain the Foreign Dataset that are mirrored by intelligence priorities included in the 2021-2023 version. He explains that he has reviewed the most recent Intelligence Priorities and is satisfied that they support his conclusions and the content of the CSIS October 2019 request to the Director.

29. I accept as reasonable the Director's justification that a new version of the Government of Canada's Intelligence Priorities does not affect his assessment of the "likely to assist" threshold. The Director's conclusions show that he is of the opinion that there should be a nexus between the information in the Foreign Dataset and the Government's intelligence priorities, and that he is satisfied such a nexus continues to exist despite the new version of the Government's intelligence priorities.

30. The record also raises the issue that the Foreign Dataset contains information that may be considered not to be current. Indeed, in his December 16, 2020, decision concerning the retention of a foreign dataset, the former Intelligence Commissioner remarked that the "information contained in the dataset is arguably outdated," thereby suggesting that older foreign datasets may no longer meet the "likely to assist" threshold required for their retention (2200-A-2020-002, p 8). The record includes an internal briefing note that was prepared in response to this remark.

31. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

32. The record indicates that the information in the Foreign Dataset was current as of

[REDACTED] The record describes that it contains the type of information that is [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] In authorizing the retention of the Foreign Dataset, the Director was therefore satisfied that despite the time passed since its collection, the information in the Foreign Dataset nevertheless met the “likely to assist” threshold. On this point, I also find that the Director’s conclusion is justified and intelligible.

33. In sum, I find that the conclusions of the Director that the retention of the Foreign Dataset is likely to assist the Service supported by his reasoning and the record. The Director’s view that the nature of the information and its link to the threat landscape meets the “likely to assist” threshold is reasonable.

c) CSIS has complied with its continuing obligations under section 11.1 of the *CSIS Act*

34. Pursuant to subsection 11.1(1) of the *CSIS Act*, CSIS must delete any information where there is a reasonable expectation of privacy that relates to the physical or mental health of an individual and must remove any information from the dataset that by its nature or attributes relates to a Canadian or a person in Canada.

- i. Obligation to delete any information related to physical and mental health – paragraph 11.1(1)(a) of the *CSIS Act*

35. The record describes the steps taken by designated CSIS employees to identify information related to physical or mental health of an individual. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED] personal information (as defined in section 3 of the *Privacy Act*) that in the opinion of CSIS is not relevant to the performance of its duties and functions and may be deleted without affecting the integrity of the dataset, pursuant to CSIS's obligations under subsection 11.07(6) of the *CSIS Act*. At the conclusion of this process, CSIS determined that the Foreign Dataset contained no information related to the physical or mental health of an individual.

36. The Director expressly notes that he determined that the steps taken by CSIS were reasonable and is satisfied that there was no information in the Foreign Dataset that met the threshold set out in paragraph 11.1(1)(a) and that no data element were therefore deleted on this basis. He also acknowledges the continuing nature of CSIS' obligations to delete any information related to the mental or physical health of an individual from the Foreign Dataset, should any be identified in the future.

37. The steps taken to identify health-related information in the Foreign Dataset are different than the steps taken with respect to the same obligation in my *IC Foreign Dataset Decision*. I do not consider this to impact the Director's conclusions. Indeed, given the nature of the information in the Foreign Dataset, I am of the view that the Director's conclusions with respect to the steps taken by CSIS, [REDACTED] are reasonable. [REDACTED] reinforces, in my mind, the Director's conclusions. [REDACTED]

- ii. Obligation to remove any information that by its nature or attributes relates to a Canadian or a person in Canada – paragraph 11.1(1)(c) of the *CSIS Act*

38. The record also details the steps taken by CSIS to identify any Canadian-related information.
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
Ultimately, [REDACTED] records were identified as relating to a Canadian or a person in Canada and removed from the dataset.

39. The Director again notes that he was satisfied the steps taken by CSIS were reasonable and acknowledges the continuing nature of CSIS' obligations to remove any information that by its nature relates to a Canadian or a person in Canada.
40. Given the nature of the information in the Foreign Dataset, I find that the Director's conclusions in this respect are reasonable.

d) The update provisions are reasonable

41. In my *IC Foreign Dataset Decision*, I outlined the Intelligence Commissioner's jurisdiction to review the Director's conclusions with respect to the proposed update provisions to determine whether they are reasonable. I wrote that the conclusions related to updating a foreign dataset can be reasonable if the record reflects that the update will not change the nature of the authorized dataset, and that the update is likely to assist CSIS in the performance of its duties. A helpful question to consider is whether, when the Director authorizes the retention of the foreign dataset, his understanding of the nature of the dataset could include the proposed updates.
42. The proposed updates to the Foreign Dataset in this matter are minimal. CSIS would acquire the new information in the same manner that the Foreign Dataset was acquired, the new information would originate from [REDACTED] and any new information would pertain to [REDACTED]. As a result, the proposed updates would allow the inclusion of additional similar information. The record expressly recognizes that if the new information collected went beyond [REDACTED] a new request for ministerial authorization would be required.

43. The Director's conclusions demonstrate that he considered and accepted that the only updates made to the Foreign Dataset could be with respect to the same type of information originating from [REDACTED] and acquired in the same manner. The Director's conclusions reflect that the nature of the Foreign Dataset would not be altered by the updates. Also, given that the updates would contain additional information, they are likely to assist CSIS in the performance of its duties and functions. As a result, I find the Director's conclusions with respect to the update provisions reasonable.

44. In light of the above, I find that the Director's conclusions made pursuant to subsection 11.17(1) reasonable.

V. REMARKS

45. I would like to make the following two remarks which does not alter my findings regarding the reasonableness of the Director's conclusions.

i) Impact of Non-Compliance Incident

46. In his conclusions, the Director outlines a non-compliance issue in relation to the discovery by CSIS of a portable media device containing the original copy of the Foreign Dataset in this matter.

47. The record explains that the content of the device had been copied onto CSIS' information system in 2018 and returned to the designated CSIS employee responsible for its possession, who then securely stored it in a cabinet.

48. In July 2019, the Foreign Dataset was deemed collected under the new dataset regime. During the 90-day evaluation period, the copy of the dataset ingested onto CSIS' information system was accessed with a view to submit to the Director a request to authorize its retention. CSIS also complied with obligations under section 11.1 of the *CSIS Act*.

49. During an office move, the portable device was found on January 27, 2022, in the secure cabinet of the designated CSIS employee who confirmed that it had not been accessed since it was returned to them in 2018. The compliance issue stems from the fact that the portable device contained [REDACTED] records that by their nature and attributes related to a Canadian or person in Canada that should have been deleted pursuant to CSIS' statutory obligations within the 90-day evaluation period.
50. CSIS referred the issue for an internal compliance review, the results of which will be shared with the appropriate oversight and review bodies. The data records in questions were destroyed on March 4, 2022.
51. The Director concludes that the records were inadvertently retained, and he remains satisfied that CSIS complied with its obligations under section 11.1 of the *CSIS Act*.
52. Given the circumstances in this matter, I find this conclusion from the Director reasonable. The intent of requiring CSIS to delete information under section 11.1 is to make sure that it cannot be retrieved, accessed and used in the future by CSIS or by any other agency or person acting on its behalf. It is reasonable for the Director to conclude that this constituted an inadvertent non-compliance incident that did not alter his view that CSIS had taken, and would continue to take, the required steps to satisfy its obligations under section 11.1 of the *CSIS Act*.

ii) Delay in authorizing the Foreign Dataset by the Director

53. In his cover letter accompanying the record, the Director acknowledges the significant delay between the CSIS request in October 2019 and his Authorization. The Director also notes that supplemental appendices were added to the initial request for retention made by CSIS on October 11, 2019. They include the [REDACTED] and [REDACTED] and the presentation deck on ministerial authorization of foreign datasets.

54. Although I found that the passage of time since the collection of the information in the Foreign Dataset did not affect the value of the information, I note that it could, in particular circumstances, have a determinative effect on the reasonableness of the Director's conclusions, namely by affecting the "likely to assist" threshold. The effect of the passage of time could be exacerbated by the fact that there is no statutory time period under which the Director must make a decision after receiving a request from the Service to issue an authorization to retain a foreign dataset. I am unconvinced that Parliament's intent was for there to be such a long delay between a request from CSIS for authorization to retain a foreign dataset and the Director's authorization. This may be an element to consider in the upcoming legislative review of the *National Security Act, 2017*.

55. Given the content of the appendices, I am of the view that they did not substantially modify CSIS' original request, and therefore that this request was not made outside the statutorily prescribed 90-day delay.

VI. CONCLUSIONS

56. Based on my review of the record submitted, I am satisfied that the Director's conclusions made pursuant to subsection 11.17(1) of the *CSIS Act* are reasonable with regard to the retention of the Foreign Dataset.

57. Therefore, pursuant to paragraph 20(2)(a) of the *IC Act*, I approve the Director's authorization to retain the Foreign Dataset.

58. As indicated in the authorization, and pursuant to subsection 11.17(3) of the *CSIS Act*, this authorization expires five years from the day of my approval.

59. As prescribed in section 21 of the *IC Act*, a copy of this decision will be provided to the National Security and Intelligence Review Agency for the purpose of assisting the Agency in fulfilling its mandate under paragraphs 8(1)(a) to (c) of the *National Security and Intelligence Review Agency Act*, SC 2019, c 13, s 2.

June 21, 2023

(Original signed)

The Honourable Simon Noël, K.C.
Intelligence Commissioner